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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/521,579	05/04/2005	Philippe Bertrand	BC-01US	4029
50446 7590 06/26/2008 HOXIE & ASSOCIATES LLC 75 MAIN STREET , SUITE 301 MILLBURN, NJ 07041			EXAMINER CHAWLA, JYOTI	
			ART UNIT 1794	PAPER NUMBER
			MAIL DATE 06/26/2008	DELIVERY MODE PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

<b>Office Action Summary</b>	<b>Application No.</b> 10/521,579	<b>Applicant(s)</b> BERTRAND ET AL.	
	<b>Examiner</b> JYOTI CHAWLA	<b>Art Unit</b> 1794	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☐ Responsive to communication(s) filed on \_\_\_\_.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1-12 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-12 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☒ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- |                                                                                        |                                                                   |
|----------------------------------------------------------------------------------------|-------------------------------------------------------------------|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)            | 4) <input type="checkbox"/> Interview Summary (PTO-413)           |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)   | Paper No(s)/Mail Date. ____.                                      |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date <u>3/25/2005</u> .                                               | 6) <input type="checkbox"/> Other: ____.                          |

### **DETAILED ACTION**

Claims 1-12 are pending and examined in the application.

#### ***Information Disclosure Statement***

The information disclosure statement filed 3/25/2005 fails to comply with 37 CFR 1.98(a)(2), which requires a legible copy of each cited foreign patent document; each non-patent literature publication or that portion which caused it to be listed; and all other information or that portion which caused it to be listed. It has been placed in the application file, but the information referred to therein has not been considered. Search was done to find the references listed in the search report and available foreign references have been included in Form 892 in the present office action and copies of foreign references found are attached herewith.

#### ***Specification***

The disclosure is objected to because of the term "contract" in line 30, page 2. It appears to be a typographical error for "contrast". Clarification and/or Correction is required. See MPEP § 608.01(b).

#### ***Claim Objections***

Claims 1-12 are objected to for the use of "characterized in that" and is suggested to rephrase it to "wherein".

#### ***Claim Rejections - 35 USC § 102***

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

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Note: Gelatin substitute as defined by the specification does not have gelling properties like gelatin, however, has stabilization properties like gelatin and can be added to culinary preparations which are heated above 60<sup>0</sup>C. (Original disclosure, page 2, line 29-page3, line 10).

1) Claims 1-2 and 11 are rejected under 35 U.S.C. 102(b) as being anticipated by Baugher et al. (US 4098913), hereinafter Baugher.

Regarding claim 1, Baugher teaches a composition of gelled vegetable fat where gelatin is not used (Abstract, and Column 2, lines 25-30).

Regarding claim 2, Bougher teaches of fat component where vegetable fat included, are rapeseed and palm oils (Column 3, lines 24-30), which are comprised of at least 75% palmitic, stearic and oleic acids and comprises a maximum of 1% of lauric acid, as instantly claimed.

Regarding claims 11, Baugher teaches of culinary preparations (Column 2, lines 40-45) by utilizing the product (Also see Column 5, lines 25-Column 6, line 23).

2) Claims 1, 4 and 11-12 are rejected under 35 U.S.C. 102(b) as being anticipated by Willi et al. (US 4363824), hereinafter Willi.

Regarding claims 1 and 4 Willi teaches a method for making a food base that is instantaneously dispersible in water from an amylaceous material and fat (palm fat) (Column 1, lines 50-55, Column 2, lines 8-15 and column 3, lines 20-30). Said food base (a roux) is used to bind dry soups and sauces in the same way as gelatin (Column 4, lines 32-36). This food base is a finished or semi-finished product that can be incorporated in mixtures for soups or sauces to bind said soups and sauces during the preparation thereof via the addition of boiling water to the dry mixtures (without forming lumps). Will also teaches of stabilizers , i.e., emulsifiers and oxidation inhibitors, i.e.,

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antioxidants as recited in claim 4 (claims 1 and 2, examples 1-4, Columns 1-3, -30, page 7, lines 3-29).

Regarding claims 11-12, Willi teaches of culinary or confectionery preparations (Column 5, lines 14-15) by utilizing the product (Also see Column 4, lines 12-23 and 33-36).

***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

Determining the scope and contents of the prior art.

Ascertaining the differences between the prior art and the claims at issue.

Resolving the level of ordinary skill in the pertinent art.

Considering objective evidence present in the application indicating obviousness or nonobviousness.

(A) Claims 1-5, 7, 9-12 are rejected under 35 U.S.C. 103(a) as being unpatentable over Itagaki et al (EP 0564787 A2), hereinafter Itagaki.

Note: Gelatin substitute as defined by the specification does not have gelling properties like gelatin, however, has stabilization properties like gelatin and can be added to culinary preparations which are heated above 60°C. (Original disclosure, page 2, line 29-page3, line 10).

Regarding claims 1, 11 and 12 Itagaki teaches of confectionery fat (vegetable fat) that can be utilized for fillings in cakes and biscuits, breads as it retains its shape and has desirable melting and whipping properties and sharp melting in mouth (Abstract, Page 2, line 40-Page3, line 15). Thus the product has stabilization property, whipping property

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and melting property, the fat containing product of Itagaki of a gelatin substitution product as disclosed. (Also see pages 2-3)

Regarding claim 2, Itagaki teaches of vegetable fats, such as cocoa butte, palm oil and rapeseed oil (Page 3, lines 13-15, 32-35 and 44-47) that are comprised of at least 75% palmitic, stearic and oleic acids and comprises a maximum of 1% of lauric acid, as instantly claimed.

Regarding claim 3, Itagaki teaches a fat composition wherein 20-80% cocoa butter (Abstract and page 3, lines 44-47), thus the fat as taught by Itagaki contains essentially cocoa butter.

Regarding claim 4, Itagaki teaches a cocoa butter containing product comprising additives such as antioxidants (fruit juices and cocoa butter), lecithins and/or other emulsifiers (Page 4, lines 15-30).

Regarding claim 5, Itagaki teaches where the cocoa butter is deodorized (Page 3, lines 10-31). Itagaki teaches completely deodorized cocoa butter which includes 90-95% deodorized cocoa butter, as recited.

Regarding claim 7, Itagaki teaches a product where the combination of fats has the melting point below 45<sup>0</sup>C, and cocoa butter has a melting point around 34<sup>0</sup>C, thus one of ordinary skill in the art at the time of the invention would expect that the confectionery fat composition as taught by Itagaki will melt at a temperature range of 30 to 40<sup>0</sup>C prior to being incorporated into the culinary preparation (Page 4, lines 30-40 and 50-57, Page 5, lines 1-10).

Regarding claim 9, Itagaki is silent as to the quantity of fat based confectionery composition that needs to be in a quantity equal to two to four times the quantity by weight of gelatin usually used in the culinary preparation, however, the reference

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teaches of cocoa butter and vegetable fat based composition as recited in claim 1. Thus the product taught by Itagaki would be expected to have stabilizing properties that are similar to the stabilizing properties of the product as recited. Thus it would have been obvious to one of ordinary skill in the art at the time of the invention that the confectionery fat composition as taught by Itagaki would be required in an amount similar to the instantly claimed gelatin substitute, absent any clear and convincing arguments and or evidence to the contrary.

Applicant is reminded that where the claimed and prior art products are identical or substantially identical in structure or composition, or are produced by identical or substantially identical processes, a prima facie case of either anticipation or obviousness has been established. In re Best, 562 F.2d 1252, 1255, 195 USPQ 430, 433 (CCPA 1977). "When the PTO shows a sound basis for believing that the products of the applicant and the prior art are the same, the applicant has the burden of showing that they are not." In re Spada, 911 F.2d 705, 709, 15 USPQ2d 1655, 1658 (Fed. Cir. 1990).

Regarding claim 10, Itagaki teaches a method of making confectionery fat composition and teaches of making filling for cookies. Itagaki is silent as to the amount of moisture in the filled cookie sandwiches. Gautchier, however, provides evidence to the moisture content cookie sandwich fillings and discloses a moisture content of 1-3% (Column 3, lines 65-76), which falls in applicant's recited range. Thus, based on the evidence of Gautchier, it is noted that Itagaki teaches of a confectionery fat composition that is incorporated in a culinary preparation that has a humidity of less than 70%, as recited by the applicant.

(B) Claims 6 and 8 are rejected under 35 U.S.C. 103(a) as being unpatentable over Itagaki (EP 0564787 A2), in view of DUFFETT (WO 98/13133)

Itagaki has been applied in an obviousness rejection to claims 1-5, 7, 9-12 above.

Regarding claims 6 and 8, Itagaki teaches of confectionery fat composition comprising cocoa butter. However Itagaki is silent as to the composition being a powder or dry form. Spray dried powders; including spray dried fat compositions were known at the time of the invention. Duffett teaches of granulated products, including cocoa butter and fats (Page 1 to page 3, line 5 and Page 13, lines 10-20), in order to make the compositions more convenient to store. Thus, fats including cocoa butter were known in dry agglomerated form at the time of the invention. Therefore, it would have been a matter of routine determination for one of ordinary skill in the art at the time of the invention to modify Itagaki and spray dry the confectionery fat composition based on the teachings of Duffett, in order to make a confectionery fat composition that can be stored for longer periods of time. Further regarding claim 8, Itagaki teaches of addition of melted fat composition in the confection or culinary product. Itagaki is silent about adding the confectionery fat to the rest of the culinary preparation and heating the latter to more than 60°C, as instantly claimed. Duffett teaches of that the spray dried compositions can be added or mixed with other ingredients at a given temperature, where the unprocessed substance at corresponding temperature is solid (Page 3, lines 20-35). Thus, spray dried confectionery fat composition of modified Itagaki can be incorporated directly into the preparation when the latter is heated to a temperature greater than 60°C, i.e., cooking/baking temperatures.

### ***Conclusion***

Any inquiry concerning this communication or earlier communications from the examiner should be directed to JYOTI CHAWLA whose telephone number is (571)272-8212. The examiner can normally be reached on 9:00 am to 5:30 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Keith Hendricks can be reached on (571) 272-1401. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.



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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/KEITH D. HENDRICKS/

Supervisory Patent Examiner, Art Unit 1794

Jyoti Chawla  
Examiner  
Art Unit 1794